

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**HTI IP, LLC AND NETWORKFLEET,
INC.,**

PLAINTIFFS,

V.

PROCON, INC., ET AL.,

DEFENDANTS.

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C.A. NO. 6:09-CV-370

**WEBTECH'S SURREPLY TO MOTION TO DISMISS COUNTERCLAIM FOR
VIOLATION OF SECTION 17200 OF THE CALIFORNIA BUSINESS AND
PROFESSIONS CODE**

1. WebTech's live pleading, found at Document 118 of the Docket, contains sufficient allegations to state proper standing and a proper claim under Section 17200 of the California Business and Professions Code ("Section 17200"). These allegations are contained in Paragraphs 31 - 40, found at pages 12 - 14 of Document 118.

2. Allegations supporting WebTech's standing are found in paragraphs 34, 35, and 36 where the injury is alleged: customers being confused and deceived by the conduct of NetworkFleet which has caused injury to WebTech by customers delaying or postponing business with WebTech. As detailed in the Declaration of Scott Edmonds, these are neither imagined acts by NetworkFleet nor imagined injury to WebTech. The acts and the injury are real. WebTech is directly injured by NetworkFleet's violation of Section 17200. The purpose of the Declaration of Scott Edmonds was to document in more detail to the Court the pled facts and injury, not to admit any shortcoming of the pleading.

3. Paragraph 32 through 33 detail the type of conduct committed by NetworkFleet that caused injury to WebTech. These allegations satisfy the “unlawful,” “unfairness,” and “fraudulent” prongs of Section 17200. The Declaration of Scott Edmonds and documents attached to it were provided to the Court to prove (without the benefit of discovery) the underlying facts supporting the statements in this notice pleading. The current pleading is proper in all respects. NetworkFleet is attempting to dismiss a properly pled claim by means of a FRCP 12(b)(6) motion, which is improper.

4. WebTech has met the applicable standard under FRCP 12(b)(6). As stated, the purpose of the Declaration of Scott Edmonds was to set forth the facts supporting the allegations of the notice pleading. Sworn evidence exists supporting the allegations. The Court should end this procedural exercise to save itself and the parties additional briefing. If the Court desires, however, WebTech will set forth these facts (and any others which have arisen or been discovered) in an amended pleading.¹ Should the Court take that path, however, WebTech respectfully requests that any Order be structured such that once those additional facts are alleged, no additional FRCP 12(b)(6) motions are filed on this issue. Otherwise, despite having in its possession sworn evidence documenting standing and violations of Section 17200, NetworkFleet will be free to trouble the Court and the parties with another motion to dismiss. That is improper.

WHEREFORE, PREMISES CONSIDERED, WebTech respectfully requests that Plaintiff's Motion to Dismiss be denied. WebTech has stated proper allegations supporting

¹ September 23, 2010 is the deadline for amending pleadings (pre-claim construction) without leave of court.

standing with respect to Section 17200 and violations of Section 17200. In the alternative, and if the Court so desires, WebTech will amend its counterclaim and hereby seeks leave to do so if the Court rules on or after September 17, 2010. WebTech respectfully requests all such other relief to which it may be entitled.

Respectfully submitted this 26th day of July, 2010,

	<u>/s/ Brett C. Govett</u> Brett C. Govett Texas Bar No. 08235900 Email: bgovett@fulbright.com FULBRIGHT & JAWORSKI L.L.P. 2200 Ross Avenue, Suite 2800 Dallas, Texas 75201-2784 Telephone: (214) 855-8000 Facsimile: (214) 855-8200 COUNSEL FOR DEFENDANTS WEBTECH WIRELESS INC. WEBTECH WIRELESS USA LTD
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CERTIFICATE OF SERVICE

Undersigned counsel certifies that this document was served in compliance with the Federal Rules of Civil Procedure and the Local Rules of the Eastern District of Texas on July 26, 2010.

/s/ Brett C. Govett
Brett C. Govett